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ABSTRACT

Three papers consider telecommunications policy in Great Britain and Germany specifically, and the nations of the European Economic Community generally. The first paper, "German Telecommunications Law and Policies" (Ernst-Joachim Mestamacker) outlines the present structure of telecommunications in West Germany, and discusses deregulation possibilities in light of the present legal situation, a recent government commission report, and the impact of Common Market rules and policies. The second paper, "British Telecommunications in Transition" (Jeremy Tunstall) (abstract only) examines British telecommunications policy against the wider background of Thatcher government efforts in communications deregulation, and argues that deregulation only "succeeds" in those areas of communications where there are already dominant national "champions" such as the BBC (British Broadcasting Corporation). The third paper, "Efficiency and Social Policy in Telecommunication: The Diversity of European Approaches" (William Melody) (abstract only) suggests that despite efforts at deregulation, the primary force influencing telecommunications will continue to be the policy decisions made by the underlying administrative superstructure. It argues further that policy relating to market competition is simply one element in the total package of policies available to achieve national political, economic, and social objectives. The original paper then reviewed different approaches being taken by European countries and contrasted them with developments in the United States and Canada. (Author/EW)

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TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE

International Comparisons I (Europe) Section

Airlie, Virginia

September 27-30, 1987

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German Telecommunications Law and Policies

(Contribution to Airlie House Conference)
September 27-30, 1987

Prof.Dr. Ernst-Joachim Mestmäcker

A b s t r a c t

The paper outlines the present structure of telecommunications in West Germany, particularly the key position of the German PTT (Bundespost). The necessity of and the opportunities for a policy of deregulation are discussed in light of the present legal situation, the recent Report of a Government Commission on a New Order for Telecommunications and the impact of Common Market rules and policies on the German system.

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German Telecommunications Law and Policies

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1. Institutional Structure

The German telecommunications system is based upon institutions and principles of venerable age and standing: a monopoly vested in and administered by the Central Government guaranteeing universal service. The principle of universal service applies to both postal services and telecommunications services. These services are provided by the Bundespost (BP). The BP is organized as an unincorporated public entity (nicht rechtsfähige Anstalt des öffentlichen Rechts). It is both a branch of the Federal Government, administered by the Minister of Postal and Communications Services,and an organizationally and financially independent enterprise. The BP is one of the biggest enterprises in Europe,with an annual turnover of more than 40 billion DM and more than 500,000 employees. 34.5 billion DM are accounted for by telecommunications services alone.

The Telecommunications Law of 1928 (Fernmeldeanlagengesetz) provides for a public telecommunications monopoly. The exercise of that monopoly is governed by public law, as

distinguished from private law. The rules of public law are those of constitutional law with respect to delegated legislative authorities of the BP and they are rules of administrative law with respect to the provision of communications services to customers.

The legal status is part of an institutional structure that protects and accommodates various economic and political interest groups: There are the employees of the BP, organized in a powerful trade union, who jealously defend their own civil service status, their participation in the administration of the BP and of the preservation of one organization for both, postal and telecommunications services. There are private corporations that develop communications technologies for the BP and that supply the hardware for the establishment and operation of the public network. They are used to, and they defend, the captive market derived from the exclusive provision of network infrastructure by the BP. Telecommunication is an important industry, where industrial policy is considered to be more effective than competition for purposes of "international competitiveness". The underlying substantial policy conflicts are rarely recognized and seldom discussed publicly. Industrial cooperation in Europe, be it bilateral cooperation with France or multilateral cooperation under the auspices of Eureka, is looked upon as an effective and internationally respectable instrument

of technological and economic progress. There is last but not least the Federal Finance Minister, who is entitled to 10 per cent of the BP's annual operating income. During the last years, the BP contributed more than 1 billion DM annually to the federal budget. These contributions were made possible by profits earned in the telephone business. There are the political parties who have traditional ties to the Postal Trade Union or to the supplier corporations, respectively. It is very difficult to find champions of reform in these groups.

2. Calls for Change

During the last decade, demands for a change of the present structure of German telecommunications have been voiced by various quarters. The reasons that argue for changes are known from the experience of practically all industrial nations. However, the progress and convergence of technologies that make institutional changes possible are not self-enforcing. If competition is excluded and restrained, it is, then, the institutional arrangements and the overall political process that determine how changes are to be brought about. So far, there is no coherent policy framework and no clear-cut policy goals for the future development of German telecommunications. However, the BP has announced that it is developing and installing an Integrated Services Digital Network (ISDN).

The just-published report of a Government Commission on a New Order for Telecommunications (1987 Commission Report) indicates an awareness that changes are either necessary or unavoidable. Contributing to this awareness are of course developments within the Common Market. The Commission's recent Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (COM 87, 290, 30 June 1987) summarizes policy goals and the instruments of implementation. As far as private industry is concerned, the call for reform was first voiced by the office-equipment industry. As it developed new instruments with computer and communication capabilities, it found itself covered by the communications monopoly. Deregulation policies in key industrial countries, particularly in the United States and Japan, contributed to long-lingering doubts whether a rather conservative public administration were capable of coping with the demands of modern communications technologies. The political parties forming the present government coalition, in their days of opposition, attacked the communications monopoly because it was used by their predecessor to prevent the development of cable networks. The professed reason behind this policy was the maintenance of broadcasting monopolies vested in public corporations of the "Länder". When the present government came to power, it decided on a comprehensive program for the installation of cable in order to

facilitate the introduction of private TV.

The probabilities for change and reform, including the implementation of the Government Committee proposals, must be considered in the institutional context of the present system of telecommunications. I propose to discuss some of the more important characteristics of the present situation with a view to their relevance for the adaptation of the system to new technologies and new opportunities for competition. I am going to take up the legal status and organization of the BP, the scope of the telecommunications monopoly, the exercise of that monopoly and the changes proposed by the 1987 Committee Report.

3. The Structure of the BP

Art. 87 para. 1 of the Constitution for the Federal Republic of Germany states that the BP is to be administered by the Federal Government with an administrative substructure of its own. The details of the organization of the BP are left to the Federal Government, which, according to Art. 77 No. 7 of the Constitution, has exclusive legislative powers over the postal and telecommunications system. Even though these provisions appear to deal with the jurisdiction over postal and telecommunications services only, they are frequently interpreted as guaranteeing the historical public-law

status of the BP. In view of the tendency of the German Constitutional Court to limit the impact of the Bill of Rights by the historical status quo of certain institutions, the outcome of an eventual constitutional conflict over the structure of the BP is an open question.

The administration of the BP is regulated by the Postal Administration Law (Postverwaltungsgesetz) of 1953. The statute endorses the unique organizational structure of the BP as a hybrid of a governmental agency and an enterprise. The statute combines features of a corporate charter with regulatory matters, particularly by providing for rule-making powers of the BP. Section 1 para. 1 of the statute determines that the BP constitutes a part of the government under the direction of the Federal Minister for Postal and Telecommunications Services. An administrative board consisting of 24 members assists in the management. The board limits and to a certain extent controls the power of the Minister. It consists of 24 members: 5 members each from Parliament, the Senate (Bundesrat), where the Länder are represented, and the "national economy"; 7 members from the personnel of the BP; and one expert each for communications and financial matters. One of the most important responsibilities of the board is the participation in the regulation of tariffs and usage conditions for telecommunications services. Tariffs and conditions are to be regulated

through rules having the force of law. Legislative authority is delegated to the Minister, who, prior to the promulgation of such rules, must obtain the approval of the board. If the board does not approve, the Minister may submit his proposal to the cabinet of the Federal Government, which may overrule the board. In the history of the BP, these cases have been very rare indeed.

The Federal Constitutional Court affirmed the constitutionality of the delegation of legislative authority to the BP. This delegation, according to the Court, is sufficiently specified with respect to content, purpose and extent of the legislation. Furthermore, the present regulation was in harmony with previous practice (Judgement of February 24, 1970, BVerfGE 28, 66, 86). The constitutionality of the BP's rule-making powers is of considerable importance for the communications system in general. These rules govern not only the tariffs for communications services but also the access to public networks, technical specifications for and the attachment of terminal equipment to the network.

Section 3 of the Postal Administration Law provides that the property dedicated to and acquired by the administration of the postal and telecommunications services must be kept separate from the property and

the budget of the Federal Government. Tbe same applies with respect to all rights and obligations. Under Section 15 of that law, the BP is required to draw up, manage and balance its own budget. All duties assigned to the BP and all obligations incurred must be met out of its own revenues. This rather old-fashioned cameralistic rule is of considerable economic and political relevance. Under the case law of the administrative courts, this rule justifies and indeed requires cross-subsidization of the different services offered by the BP. The most important application is the subsidization of the postal services from profits from the telephone services. But the principle applies as well to communications services and to the subsidization of such services offered in competition with private competitors.

According to the Constitution and the Postal Administration Law, the legal status of the BP is that of an unincorporated public entity. This status has been the product of history rather than of legislative design. It explains most of the unusual characteristics of the BP and the controversies concerning its proper organizational structure. The public-law status of the BP determines the rules applicable to its employees and to the conduct in relation to its customers. The customers of the BP are not private-law buyers but public-law users. The rules adopted by the BP and their implementation are

subject to judicial review in the administrative courts.

Most rules of national economic law apply to commercial activities only and not to administrative action. More specifically, the rules promulgated by the BP and the conduct in conformity with these rules are exempted from the provisions of the antitrust laws (Section 99, para. 1, German Act Against Restraints of Competition).

The 1987 Committee Report recommends to separate postal services from telecommunications services and to separate the provision of communications services from the ministerial responsibility of regulation. The supply of communications services should not be governed by administrative law but by private law. The new enterprise, which is to be named "Telecom", would, however, not be a private corporation; it would still be an unincorporated public entity to be managed by a board of directors under the supervision of the Minister.

These recommendations are in harmony with the Green Paper of the EC Commission. Among the proposals of the Commission is the separation of regulatory and operational functions of telecommunications administrations in those member-states where this has not been carried out: "In a more competitive environment, the telecommunications administrations cannot continue to be both regulator and market participant, i.e., referee and player.

Regulatory functions concern in particular licensing, control of type approval and binding specifications, frequency allocations and surveillance of usage conditions. However, the Commission accepts that the different status of public and private network operators will persist" (p. 17/18).

As far as Community law is concerned, the transformation of PTTs from a public-law status to a private-law status has lost some of its significance. In the landmark British Telecom case, the Court of Justice approved the finding of the Commission that British Telecom had abused a dominant position by issuing rules that were to prevent competitive activities of telex-forwarding agencies in Great Britain (March 20, 1985, Italy v. Commission, 41/83, Cases 1985, p. 873). The significance of the case in the present context is the holding of the Court that in finding whether or not a certain conduct is that of an enterprise, one must look to the substance of the conduct and not to the legal form under the law of the member-states. Although it is a well-recognized principle of Community law that it will not be bound by the treatment of facts under the law of the member-states, it is the first time that legislative acts by a member-state have been found to be activities of an undertaking within the meaning of the rules of competition.

4. The Scope of the Telecommunications Monopoly

Under Section 1 para. 1 of the Law on Telecommunications (Fernmeldeanlagengesetz) of 1928, the Federal Government is accorded the exclusive right to establish and operate telecommunications installations. In designating communications services as "installations", the statute reflects the extent to which the network infrastructure had formerly been identified with universal service. The term "telecommunications installation" comprises - according to the statute - telegraph, telephone and radio installations. As far as radio installations are concerned, the text of the statute (Section 1 para. 1 S. 2) leaves no doubt that both the broadcasting and the receiving devices are separate installations within the meaning of the statute and are consequently covered by the communications monopoly.

a) Point-to-Point Communications

The scope of the telecommunications monopoly and the regulatory powers of the BP with respect to telecommunications have been outlined by the Federal Constitutional Court in the so-called "Modem Case" (Judgement of October 12, 1977, BVerfGE 46, 120). Before the Court were two questions: Does the communications monopoly cover communications services (in this case: data communication) that were not known at the time the law on telecommunications was passed? And are the instruments

necessary to send and receive electronic messages (in this case: modems) covered by the monopoly as well? The Court, in recognizing a wide area of discretion for the BP, answered both questions in the affirmative. After a thorough review of the history of the telecommunications monopoly and the legislative history, the Court concluded that the term "telecommunications installations" was not limited to those communications known at the time when the statute was enacted, but covered new communications technologies as well that make possible an incorporeal transmission of messages reproduced at the receiving side (op.cit. 144).

With similar arguments, the Court held that "telecommunications system"-within the meaning of the Postal Administration Act-covered the additional equipment necessary for the transfer of processed data: "The meaning of the term 'telecommunications system' is not limited by the means of transmission including the end of the conduit - in other words, by the network itself - but rather the term extends to equipment that makes possible the transmission: in telephony the telephone set; in telex the telex machine; in datex the subscriber equipment. The same applies to special equipment necessary for digital data communication (modem)" (op.cit. 144, citations to the pertinent rules governing the usage conditions of the different services deleted).

Even though the Court refrained from passing upon the constitutionality of the telecommunications monopoly as such, it approved the exercise of the rule-making power of the BP for the purpose of monopolizing terminal equipment.

It follows that under the present régime, the communications monopoly can be extended to new communications technologies. As long as there are no infringements of the Bill of Rights, it is within the disretion of the BP to exercise or not to exercise its monopoly. This situation will remain unchanged until the legislature steps in or Community law limits the exercise of the monopoly.

b) Broadcasting

"Electric broadcasting devices" are covered by the telecommunications monopoly. In the early history of the Federal Republic, the Federal Government proposed to use this power to set up a public broadcasting system under its own control. In one of the major controversies between the Federal Government and the States (Länder) under the then new Constitution, the Constitutional Court ruled that the communications monopoly covered the technical communication of broadcasting only, while jurisdiction over programming was under the exclusive jurisdiction of the "Länder": "The postal and communications services within the meaning of the Constitution cover the technical part of broadcasting only, without

extending to the production of programs, consequently, not to broadcasting as a whole. Article 73 No. 7 of the Constitution does not confer power on the Federal Government to regulate the organization of broadcasting and the internal organization of broadcasters or to legislate in the area of broadcast programs. The legislation called for by Article 5 for the guarantee of the freedom of broadcasting, particularly, the guidelines for programming, are under the exclusive legislative competence of the Länder with respect to both substance and organization ..." (Judgement of February 28, 1961, BVerfGE 205, 225). The strict separation of conduit, which is subject to the communications monopoly, and content, which is under the exclusive jurisdiction of the "Länder", has been carefully observed in the organization of German broadcasting. The convergence of telecommunications, data processing and audio-visual technologies, noted by the EC Commission in the Green Paper (p. 9), has caused some strains within this system. Possible conflicts between jurisdiction over communications and jurisdiction over broadcasting became apparent with respect to cable systems. While the former government ordered the BP not to install cable networks in order to prevent private TV, the present government devotes a major part of the BP budget to the installation of cable systems. Although the indirect effects on broadcasting are undeniable, the control over the use of cable systems for broadcasting

purposes is with the "Länder". They have set up special public authorities administering the access to cable broadcasting in accordance with respective state legislation.

The launching and operation of satellites comes under the telecommunications monopoly of the Federal Government, as do all uses of satellites - for purposes other than broadcasting. The principles to be applied to satellite broadcasting have been agreed upon by the "Länder" in a treaty of 1986, which ended long years of political controversies.

The opportunities for private investment in cable systems offered by the BP a few years ago had a very limited response so far. The most important reason is that the BP is not in a position to license the use of privately installed cable for broadcasting purposes. The private investor does not acquire the right to decide upon the use of his investment. Thus, private participation in the installation of cable does not change the separation of conduit and content. It is just another way in which the BP is financing cable installation.

5. The Exercise of the Telecommunications Monopoly: Terminal Equipment and the Modem Case

The rules regulating digital data communication via the telephone network required that all modems used for this purpose had to be acquired from and owned by the BP. The German Constitutional Court, in the ruling already referred to, found this usage condition to be constitutional. However, the EC Commission brought a case against the BP, challenging the ownership rule under

Article 37 and Article 86 of the Treaty of Rome. Article 37 prohibits discriminations by state trading monopolies, while Article 86 prohibits the abuse of a dominant position. The German Government argued that modems were an integral part of the public network, and therefore the exclusive supply by the BP was justified. In the Fifteenth Report on Competition Policy, the Commission summarized the case as follows: "The Commission considered that such an extension of the Bundespost monopoly fell within the second paragraph of Article 37 and that the tying of the provision of telephone network services to the purchase of modems was also an abuse of the BP dominant position as network operator contrary to Article 86."

In the Green Paper of 1987, the Commission indicated that it is examining the possibility of using the provisions of Article 90 para. 3 to deal with the problem of

terminal equipment on a global basis. Article 90 para. 3 empowers the Commission to issue directives and decisions against member states when it is necessary to assure compliance by the member-states and their public enterprises with the rules of the Treaty, particularly with the rules of competition. The Article 90 powers are potentially very effective because they do not require action by the Council of Ministers.

There appears to be general agreement that the markets for terminal equipment should be liberalized. The 1987 Commission Report recommends that every customer of Telecom should have the right to install network-compatible plugs that permit the interconnection of all equipment. Telecom should have no monopoly for the supply or the servicing of terminal equipment. Telecom should, however, be entitled to enter all markets in competition with private suppliers. The licensing of terminal equipment is to be transferred to an independent agency under the supervision of the Minister for Postal and Telecommunications Services. The conditions for approval are to be applied equally to the equipment offered by Telecom and by private competitors. The approval of terminal equipment should be denied only if it interferes with or endangers the network or communicating partners.

The critical point in the regulation of terminal equipment is the participation of the BP as competitor. Most important is the market for private branch exchanges (PBX). In the past,tariffs and conditions issued under the rule-making powers of the BP for its own customers have been adhered to by private competitors, making the BP the "price leader" in this market.

6. Communications Services

The BP has a one hundred per cent monopoly in the provision of all kinds of communications services. Most important are the public networks (including the public telephone network), the public telex network, the public datex network as well as the network for digital data communication. The 1987 Commission Report recommends the preservation of the monopoly for the network infra-structure "as long as the Bundespost provides leased lines (dedicated lines) at reasonable and competitive conditions in accordance with the qualitative and quantitative needs of users". To be distinguished from the provision and operation of the network infrastructure are the services to be offered over the network.

The 1987 Commission Report starts the discussion of communications services with the following diagnosis: "As long as it is undecided whether the BP may enter

the field of combined telecommunications and computer services and whether private business must rely on the approval of the BP when they want to provide services for third parties, innovation will be interfered with and delayed" (p. 35). In the Report, three different kinds of services are distinguished:

monopoly services;
obligatory services;
liberalized services.

The only monopoly service is the telephone service. All other services, according to the Commission, are to be open to competition. However, obligatory services are those where Telecom has the duty of maintaining the communications infrastructure with uniform tariffs for the whole territory and the obligation to offer service to all customers without discrimination. In short: In the provision of obligatory services Telecom has the status of a common carrier. It is for the legislature to decide which services are to be provided as obligatory services. It is not difficult to guess that the services offered today by the BP will be among these obligatory services. The decision on obligatory services is to be reviewed "continuously": "It is possible that liberalized services are classified as obligatory services; by the

same token, obligatory services with diminishing relevance for the public interest or after complete saturation of demand through the market might be released from regulation and classified as liberalized services."

The regulatory régime recommended in the Report distinguishes tariffs for monopoly services that are subject to approval by the Minister; tariffs for obligatory services that are subject to approval only upon application by Telecom; and tariffs and conditions of liberalized services that are unregulated for Telecom and its competitors.

The Report recognizes that the development of competition for communications services depends upon the solution of conflicts caused by the use of the network by the network operator and its competitors.

It is worth-while to quote verbatim that part of the Report which deals with tariffs and their impact upon competitors that will offer communications services via the network controlled by Telecom: "The additional costs which are caused by the common carrier's status of the network operator must be included in the prices charged to suppliers of competitive services using the network. These suppliers are either private competitors leasing dedicated lines or using the public switched network or those branches of Telecom using the

network in order to supply communications services to customers. With respect to private competitors, a real exchange takes place,and the prices are paid to the network operator. If branches of the network operator use the network, internal transfer prices are applied. In this context, the Commission recommends:

> the measures related to the fulfilment of the common carrier's obligation must not expose private competitors to unfair competition from Telecom;
>
> internal transfer pricing for the use of the network by branches of Telecom must be identical with the tariffs charged private users of the network" (p. 152 a).

The Report goes on to stress that these rules do not preclude cross-subsidization with respect to the different networks operated by Telecom as a common carrier.

It is difficult to imagine that private competitors will be prepared to enter the market for obligatory services under the conditions given. Telecom,in cooperation with the Minister,has almost unlimited discretion in setting tariffs and usage conditions for services designated to be "obligatory" services. In accordance with the EC Commission, the 1987 Commission Report emphasizes that PTTs are to be protected against "cream skimming". The

opportunities for the competitive supply of communications services will consequently depend upon the criteria employed for the finding of "cream skimming". The most likely standard will be the impact competitive services have upon the given tariff structure of the PTT. This tariff structure so far has little or no relation to the actual costs of the different services. Under these conditions, "cream skimming" is identical with competition for services that bear no relation to the costs of offering them.

As to liberalized services to be offered without regulation by Telecom and its competitors, the Report goes out of its way to assure Telecom's full competitive freedom: "Complete freedom in the supply of liberalized services and the prices charged for them applies to Telecom as well. It must be in a position to counter competitive moves immediately and to push development on its own" (p. 164). Even before publication of the 1987 Commission Report, BP's position on this all-important issue of offering competitive services (value-added services) over the network has been stated in the BP's Yearbook very succinctly: "Economies of scale and of scope do not argue against competition for value-added services. If these economies, however, are substantial when compared with economies of specialization, it must be expected that this competition will not be very effective. As long as

there are no obligations of universal service for the network operator in the supply of value-added services, there is no reason not to permit competitive access. But it should be very clear that the network operator should take full advantage of these economies by a proportionate lowering of tariffs in the interest of consumers" (Schön-Neumann, Mehrwertdienste /value-added services/ in der ordnungspolitischen Diskussion, Jahrbuch der Deutschen Bundespost, 1985, p. 478, 502). Private competitors faced with this kind of competition are bound to argue that the meeting of competition by the PTT is just another term for predatory pricing to keep them out of the market.

Under the proposed régime, the telephone monopoly is maintained as a matter of law. The monopoly of obligatory services will be maintained as a matter of regulation. The viability of "liberalized services" will depend upon the conditions that apply to the use of the network. Although the Report recognizes the conflicts to be expected, their resolution is left to the discretion of the Ministry.

The Report offers recommendations for a more efficient organization and administration of the BP. It takes notice of policy developments in the United States, Japan and Great Britain, but it fails to spell out the lessons to be learned from these experiences. And the Report is altogether too reticent in its contributions to the

public-policy debate in West Germany and in Europe. The only reference to international communications is that to international standardization of equipment. But there is not even a reference to the recommendation of the EC Commission to make possible direct transborder communications within the Common Market. It is this issue that is of key importance in developing GATT rules for communications services.

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INTERNATIONAL COMPARISONS I (Europe)
Chair: Eli Noam

Jeremy Tunstall: British Telecommunications in Transition

Telecommunications policy will be seen against the wider background of Thatcher government efforts in communications deregulation . A central problem of Thatcher-style deregulation is that market forces are cast in the leading role. In practice deregulation only "succeeds" where there are dominant champion organizations (e.g. BT, BBC); it "fails" in the presence of strong competition and the lack of a dominant national champion (e.g. Space, new media).

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William Melody: Efficiency and Social Policy in Telecommunication: The Diversity of European Approaches

The move in many countries to privatise and deregulate the telecommunication sector in recent years has exposed the superstructure of administrative regulation underlying the market arrangements. Despite a shift toward increased emphasis on the market, the primary force influencing future developments will be administrative policy decisions. Policy relating to market competition is simply one element in the total package of policies available to achieve national political, economic and social objectives. This presentation will review the different approaches being taken by European countries and the EEC and contrast them with developments in the U.S. and Canada.

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